APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Docket No. 20,078

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,
Appellant,

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,
Appellee.

Appeal from the New Mexico Taxation and Revenue Department, Gerald B. Richardson, Hearing Officer

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OPINION

PICKARD, Chief Judge.

Production Credit Association of Eastern New Mexico (PCA) filed a claim for refund of New Mexico corporate income and franchise taxes for the 1992-1996 tax years with the New Mexico Taxation and Revenue Department (Department). PCA claimed it was entitled to a refund because (1) Congress declared production credit associations like PCA to be federal instrumentalities, (2) federal instrumentalities are inherently immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives their immunity, and (3) Congress did not expressly waive PCA's immunity for the tax years at issue. The Department's internal hearing officer

denied PCA's claim on the grounds that (1) Congress expressly waived the tax immunity enjoyed by privately owned production credit associations in the Farm Credit Act of 1933 and (2) Congress did not intend to confer upon these associations an implied immunity from state taxation by passing the Farm Credit Amendments Act of 1985, which repealed the express tax immunity waiver that had been in place since Congress passed the Farm Credit Act of 1933. We agree with the hearing officer and affirm his decision for the reasons stated below.

BACKGROUND AND PROCEDURAL HISTORY

In 1916, Congress passed the Federal Farm Loan Act (1916 Act). *See* Pub. L. No. 64-158, §§ 4, 12, 39 Stat. 360, 362-64, 370-72 (1916). The 1916 Act established the Farm Credit System (System). *See id.* The System was created for the purpose of providing secured credit to farmers and ranchers at reasonable cost. *See* S. Rep. No. 144, at 2-3 (1916). The System, which then consisted of twelve regional land banks, could make loans only to farmers and ranchers. *See* Pub. L. No. 64-158, §§ 4, 12, 39 Stat. at 362-64, 370-72. The loans had to be secured by first mortgages on farm or ranch property. *See id.* Seven years later, Congress created federal intermediate credit banks for the purpose of making farm and ranch loans that could be secured by something other than first mortgages on farm or ranch lands. *See* Pub. L. No. 67-503, § 202(a)(3), 42 Stat. 1454, 1455 (1923).

In 1933, Congress, in response to the Great Depression, passed the Farm Credit Act of 1933 (1933 Act). *See* Pub. L. No. 73-75, § 20, 48 Stat. 257, 259. The 1933 Act established production credit associations (credit associations) like PCA for the purpose of providing short- and intermediate-term loans to farmers and ranchers. *See* S. Rep. No. 124, at 2 (1933). The United States initially capitalized and owned all the stock in the credit associations. *See id.* Pursuant to statute,

the credit associations were exempt from state taxation while the federal government owned stock in them. *See* Pub. L. No. 73-75, § 63, 48 Stat. at 267. However, pursuant to the same statute, once the federal government's stock was retired, the 1933 Act expressly waived the credit associations' immunity from state income and franchise taxes. *See id.* Congress hoped that the United States' ownership interest in the credit associations would come to an end at some point and that the credit associations would eventually become locally owned by their borrowers. *See* S. Rep. No. 124, at 2.

In order to fulfill its hope, Congress required farmers and ranchers to purchase stock in the credit association from which they were borrowing in an amount equal to 10% of the unpaid principal balance of their respective loans. As part of the loans, sufficient proceeds were generally advanced to the borrowers to purchase the required stock. Congress's hope was realized in the 1960s, by which time the credit associations were owned entirely by the farmers and ranchers who had borrowed money from them. The federal government no longer had an ownership interest in any credit association, nor has it since.

The Farm Credit Administration, which is the federal body responsible for regulating and examining the entities within the System, authorized the incorporation of PCA as a credit association in 1934. As an incorporated and federally chartered credit association, PCA is a statutorily declared federal instrumentality. *See* 12 U.S.C. § 2071(a), (b)(7), § 2077 (1994). PCA's corporate purpose, like that of all other credit associations, is to exercise the powers granted to it by Congress under the 1933 Act as it existed or as it has been amended. Among other things, PCA loans money for periods of ten years or less; does not lend to the general public, but lends only to qualified ranchers or farmers; is not a depository bank; and has no deposit insurance.

In 1971, Congress passed the Farm Credit Act of 1971 (1971 Act). *See* Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971). The 1971 Act made a number of significant changes to the 1933 Act, but retained the tax provisions contained within the 1933 Act. *See id.* The tax provisions in the 1971 Act provided in relevant part:

> Each production credit association and its obligations are instrumentalities of the United States . . . . *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority . . . . The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

Id. (emphasis added).

In 1985, Congress passed the Farm Credit Amendments Act of 1985 (1985 Act). *See* Pub. L. No. 99-205, § 205, 99 Stat. 1678 (1985). The 1985 Act, among other things, repealed the highlighted sentences in the taxation section of the 1971 Act quoted above. *See id.*, § 205(d)(16), 99 Stat. at 1705. As a result, the limited waiver of immunity from state taxation that had been expressly worded in both the 1933 Act and the 1971 Act was not explicitly mentioned in the 1985 Act.

PCA timely filed New Mexico corporate income tax returns and timely paid New Mexico corporate income taxes for the tax years 1992, 1993, 1994, 1995, and 1996. PCA timely submitted claims for refund of all New Mexico income taxes paid for tax years 1992-1996 in the total amount of $343,782. PCA based its claims for refund upon its understanding that, as a federal instrumentality, it is immune

from state taxation pursuant to the Supremacy Clause of the Constitution. After the Department denied its claims, PCA timely filed a protest. In this consolidated proceeding, PCA seeks all amounts claimed as refunds for its 1992-1996 tax years, plus interest thereon, as provided in NMSA 1978, § 7-1-68 (1996).

STANDARD OF REVIEW

The issue presented for our review is whether Congress intended to confer tax immunity upon privately owned production credit associations by passing the 1985 Act, which repealed the express tax immunity waiver contained in both the 1933 Act and the 1971 Act. The parties submitted this issue to the Department's internal hearing officer for consideration upon stipulated facts. Accordingly, we are presented with an issue of law, which we must review *de novo*. *See State v. Ogden*, 118 N.M. 234, 240, 880 P.2d 845, 851 (1994) (ruling that issues of law are reviewed *de novo*); *State v. Romero*, 119 N.M. 195, 197, 889 P.2d 230, 232 (Ct. App. 1994) (ruling that interpretation of statute is an issue of law). In conducting our review, we will not defer to the hearing officer's decision "because it is the function of the courts to interpret the law." *Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995).

DISCUSSION

I. FEDERAL INSTRUMENTALITY

PCA claims it is an instrumentality of the federal government. We agree. The 1933 Act expressly stated that credit associations like PCA are federal instrumentalities. *See* Pub. L. No. 73-75; § 63, 48 Stat. at 267. Although Congress significantly altered the 1933 Act when it passed the 1971 Act, Congress nevertheless maintained the classification of credit associations as instrumentalities of the federal

government in the 1971 Act. *See* 12 U.S.C. § 2071(a) ("Each production credit association shall continue as a Federally chartered instrumentality of the United States."); 12 U.S.C. § 2077 ("Each production credit association and its obligations are instrumentalities of the United States. . . ."). These provisions were not disturbed when Congress passed the 1985 Act, and they remain in effect to this day. In view of the fact that PCA is a federal instrumentality, we next address the consequences that result from PCA's status.

II. IMMUNITY FROM STATE TAXATION

A. Inherent Immunity

PCA claims credit associations, as federal instrumentalities, are inherently immune from state taxation under the Supremacy Clause of the United States Constitution unless Congress expressly waives that immunity. The Department counters that PCA's focus on constitutional immunity is misplaced because

> Congress did not rely on *constitutional* immunity in the original or subsequent Farm Credit Acts or enact a waiver of constitutional immunity. Rather Congress enacted both an explicit *statutory* immunity from state (and federal) taxes and an express statutory exception to that immunity for PCA's no longer federally owned.

In light of its contention, the Department intimates that credit associations like PCA would be subject to state taxation—even though Congress has deemed them to be federal instrumentalities—if not for Congress expressly granting them immunity from state taxation. We disagree with the Department. The Supremacy Clause inherently bars state taxation of federal instrumentalities, *see McCulloch v. Maryland*, 17 U.S. 316, 435-36 (1819), unless taxation is "authorized by Congress," *see First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 340 (1968).

As PCA claims, the now time-honored rule set forth in *McCulloch* has been followed by an unbroken line of Supreme Court decisions. *See, e.g., United States v. Tax Comm'n*, 421 U.S. 599, 605 (1975) (holding that state could not impose tax upon sales to military base); *Department of Employment v. United States*, 385 U.S. 355, 358-59 (1966) (holding that Red Cross as a federal instrumentality is immune from state taxation); *Federal Land Bank v. Board of County Comm'rs*, 368 U.S. 146, 149 (1961) (stating that "a federal instrumentality is not subject to the plenary power of the States to tax"); *United States v. County of Allegheny*, 322 U.S. 174, 176 (1944) ("[S]ince 1819, when Chief Justice Marshall in the *McCulloch* case expounded the principle that . . . instrumentalities of the Federated Government are immune from taxation by [the States], this Court never has departed from that basic doctrine or wavered in its application."); *Osborn v. Bank of the United States*, 22 U.S. 738, 865 (1824) (ruling that congressional silence as to immunity from state taxation of federal instrumentality did not change the fact that it was immune from state taxation); *see also Peisker v. Unemployment Comp. Comm'n*, 45 N.M. 307, 309, 115 P.2d 62, 63 (1941) (stating rule of *McCulloch*). In view of the fact that PCA is inherently immune from state taxation, we must next address whether Congress purposely waived its immunity and whether further legislation was intended to be a return to inherent immunity.

B. Congressional Waiver

The Department's internal hearing officer concluded, and PCA concedes, that Congress expressly waived the inherent tax immunity enjoyed by privately owned credit associations in both the 1933 Act and the 1971 Act. The hearing officer also concluded that Congress did not intend, by passing the 1985 Act, to confer upon these credit associations an implied immunity from state income and franchise taxes. In order to draw this conclusion, the hearing officer looked to the entire

legislative history and congressional intent underlying the 1985 Act.

PCA contends the hearing officer erred by delving into legislative history and congressional intent because the 1985 Act expressly repealed the pre-existing waiver of tax immunity contained within the 1933 Act without qualification or equivocation. According to PCA, under the plain meaning rule, we must give effect to the 1985 Act's language and refrain from further interpretation because its language is clear and unambiguous. *See State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) (stating the plain meaning rule).

PCA correctly points out that neither an administrative agency nor an appellate court can resort to legislative history or the principles of statutory construction when the statute in question is clear and unambiguous. However, PCA is mistaken in its contention that a statute that is apparently clear and unambiguous on its face is always subject to the plain meaning rule. As our Supreme Court has stated:

> [C]ourts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate . . . differences of opinion concerning the statute's meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While . . . one part of the statute may appear absolutely clear and certain to the point of mathematical precision, *lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to*

> *accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object--underlying the statute. See Perea [v. Baca]*, 94 N.M. [624,] 627, 614 P.2d [541,] 544 [(1980)] (courts are permitted to interpret by looking to legislative intent if there is *any doubt* as to the meaning of the words) (emphasis added); *State v. Herrera*, 86 N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (statute construed based on perceived legislative object and purpose, rather than on literal language) . . . .

State ex rel. Helman v. Gallegos, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (emphasis added).

As we explain below, both the history and background of the 1985 Act, and the apparent conflict between the 1985 Act's wording and the overall legislative intent expressly set out in the 1933 and 1971 acts, give rise to genuine uncertainty as to what Congress was trying to accomplish when it passed the 1985 Act. Consequently, we must search for and effectuate the legislative intent underlying the 1985 Act.

1. 1933 Act and 1971 Act

We first consider the legislative acts that preceded the 1985 Act. In the 1933 Act, Congress expressly stated that it intended for credit associations to lose their immunity from state taxation when the federal government no longer owned stock in them. *See* Pub. L. No. 73-75, § 63, 48 Stat. at 267. In the 1971 Act, Congress continued to evince that intention. *See* Pub. L. No. 92-181, § 2.17, 85 Stat. at 602. In particular, Congress continued to expressly limit the tax immunity enjoyed by credit associations by stating

> [production credit] associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now

> or hereafter imposed by the United States or any State, territorial, or local taxing authority. . . . *The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

See id. (emphasis added). In view of the express language contained in both the 1933 Act and the 1971 Act, we hold that Congress intended to subject privately owned credit associations to state income and franchise taxes prior to passing the 1985 Act.

2. 1985 Act

In the 1985 Act, Congress repealed the two sentences in the taxation section of the 1971 Act that expressly exempted credit associations from state taxation until the federal government no longer held an ownership interest in them. *See* Pub. L. No. 99-205, § 205(d)(16), 99 Stat. at 1705. As a consequence, the express waiver that had appeared in both the 1933 Act and the 1971 Act no longer appeared in the 1985 Act. According to the Department, that result leaves us to consider (1) whether the deletion was intended simply to omit unnecessary language, having no substantive effect, since the waiver exception had completely swallowed the qualified exemption or (2) whether Congress intended a complete about-face on the issue of state taxation of credit associations. As we discuss below, we believe Congress simply intended to omit unnecessary language.

a) Surplus Language

As we stated above, Congress intended to subject privately owned credit associations to state income and franchise taxes under both the 1933 Act and the 1971 Act. Indeed, Congress hoped that the federal government's ownership interest in the credit associations would come to an end at some point and

that the credit associations would eventually become locally owned by their borrowers. *See* S. Rep. No. 124, at 2. Congress's hope was realized in 1968, by which time every credit association was, in fact, privately owned by the farmers and ranchers who had borrowed money from them. It would therefore have been useless, mere surplusage, for Congress to include an express waiver in the 1985 Act. By that time, every court that had had the occasion to address the taxability of privately owned credit associations honored Congress's intent and held in the tax collector's favor. *See, e.g., Woodland Prod. Credit Ass'n v. Franchise Tax Bd.*, 37 Cal. Rptr. 231, 233 (Ct. App. 1964) ("It is difficult . . . to avoid the belief that, once these associations became farmer-owned, Congress meant to place them on a tax parity with comparable, privately held entities."); *Montana Livestock Prod. Credit Ass'n v. State*, 393 P.2d 50, 53 (Mont. 1964); *Columbus Prod. Credit Ass'n v. Bowers*, 180 N.E.2d 1, 2 (Ohio 1962); *Baker Prod. Credit Ass'n v. State Tax Comm'n*, 421 P.2d 984, 985 (Or. 1966) (en banc).

b) Technical Changes

In view of the fact that, by 1985, Congress had evinced its intention to subject privately owned credit associations to state taxation for well over 50 years and that the courts had uniformly supported Congress's power to do so, it would have been a major substantive change in legislative direction to suspend state taxation of such associations. As the Department argues, if Congress intended to make a major substantive change in the way credit associations were taxed by passing the 1985 Act, "one would expect that there would be some mention of the change in the legislative history." And yet there is none. To the contrary, the House Report commentary on Section 205 of the 1985 Act states:

> Section 205 contains numerous *technical and conforming amendments to the provisions of the Farm*

> *Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration.* This section would amend the appropriate provisions of the Act to delete the requirement for specific approval by the Farm Credit Administration of certain activities of the banks and associations and by deleting the general authority of the Farm Credit Administration to supervise System institutions. These changes are consistent with one of the major purposes of the legislation which is to establish the Farm Credit Administration as an arms length regulator of the System institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions.

H.R. Rep. No. 425, at 28 (1985).

Thus, neither the 1985 Act nor its written legislative history indicates any intention by Congress to purposefully remove the long-standing waiver of immunity from privately owned credit associations. We agree with the Department that "[i]t is extraordinarily unlikely that Congress would have intended such a marked change in the tax status of PCA's without a single mention of such change in any of the legislative history."

c) Return to Inherent Immunity

PCA's retort to this legislative history and congressional intent analysis is that "the Constitution provides immunity unless waived; and it is clear that the immunity was not waived for the period of PCA's claim for refund." PCA intimates that in light of *McCulloch*, Congress did not and could not legislate out of existence the credit associations' inherent immunity from state taxation under the Supremacy Clause without some current express language doing so. We disagree.

In *McCulloch*, the Supreme Court determined that states lack the power to tax federal instrumentalities due to the Supremacy Clause. *See McCulloch*, 17 U.S. at 435-36. Thus, when Congress is completely silent on state taxation of a federal instrumentality, the Supremacy Clause would bar state taxation. *See Osborn*, 22 U.S. at 865. However, when Congress expresses its intention to subject a federal instrumentality to state taxation, it is obvious that the Supremacy Clause would permit taxation. *See First Agric. Nat'l Bank*, 392 U.S. at 340 (ruling that national banks, as federal instrumentalities, are only subject to state taxation to the extent authorized by Congress).

In the case at bar, Congress expressly waived the state tax immunity of privately owned credit associations since credit associations were first created by the 1933 Act. Although the language waiving the exemption from state taxation was dropped in the 1985 Act, our analysis of the 1985 Act's entire legislative history, both that in the Congressional Record and that shown by the historical background of the legislation, leads us to the conclusion that Congress did not intend to confer tax immunity upon privately owned credit associations in the 1985 Act. We therefore hold that PCA is not immune from the imposition of corporate income tax under the Supremacy Clause of the United States Constitution.

In crafting this holding, we acknowledge that the other courts that have considered the issue now before us for appellate review have ruled that, under the 1985 Act, all credit associations are immune from state taxation. *See, e.g., Arkansas v. Farm Credit Servs.*, 994 S.W.2d 453 (Ark. 1999); *Farm Credit Servs. of Mid-America v. Department of State Revenue*, 705 N.E.2d 1089 (Ind. Tax Ct. 1999). These courts, without exception, have based their decisions on the well-settled rule that federal instrumentalities retain their inherent immunity from state taxation in the face of Congressional silence. *See Arkansas*, 994 S.W.2d at 455 ("Our federal

government is immune from taxation imposed by the state, unless that immunity is waived, explicitly or expressly, by a statutory waiver of that immunity."); *Farm Credit Servs. of Mid-America*, 705 N.E.2d at 1092 ("The rule that the Supremacy Clause bars state taxation of federal instrumentalities, absent congressional waiver, dates from the U.S. Supreme Court's decision in *McCulloch* . . . .") (footnote omitted). Due to the fact that the 1985 Act fails to expressly waive the tax immunity enjoyed by credit associations, these courts have concluded that such associations are not subject to state taxation. *See Arkansas*, 994 S.W.2d at 456 ("The current version of § 2077, with its silence on the issue [of state taxation], compels a holding of immunity . . . ."); *Farm Credit Servs. Of Mid-America*, 705 N.E.2d at 1092 ("Because Congress has not waived . . . immunity from state taxation, under the Supremacy Clause, Indiana is without power to collect the [tax] from Mid-America.").

In our view, these courts' narrow and exclusive focus on the 1985 Act's language produces a logical but incorrect result. We agree with the courts that if we looked at the law only at the time when PCA was taxed, PCA would be entitled to a refund for the 1992-1996 tax years because the 1985 Act is silent on the issue of state income taxation. Our review of the issue presented on appeal, however, is not confined to a cursory or wooden analysis of the 1985 Act. *See Gallegos*, 117 N.M. at 353, 871 P.2d at 1359 (ruling that it is our responsibility to search for and effectuate the legislative intent underlying the statute in question). After examining the 1985 Act's clear and extensive legislative history, we believe, for the reasons stated above, that Congress has unequivocally evinced its unwavering intention to subject privately owned credit associations to state income taxation. In particular, we are most persuaded by the dissent in *Farm Credit Services v. Arkansas*, 76 F.3d 961,967 (8th Cir. 1996) (Loken, J., dissenting), *rev'd on other grounds*, 520 U.S. 821 (1997). We must give deference to that intention. *See State v. Herrera*, 86

N.M. 224, 225-26, 522 P.2d 76, 77-78 (1974) (ruling that when a legislative body's perceived legislative intent fails to coincide with a statute's wording, it is the perceived intent, and not the statute's literal language, that we must vindicate).

CONCLUSION

For the reasons stated, we affirm.

IT IS SO ORDERED.

/s/ Lynn Pickard
LYNN PICKARD
Chief Judge

WE CONCUR:

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE
Judge

/s/ Jonathan B. Sutin
JONATHAN B. SUTIN
Judge

APPENDIX B

BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

NO. 98-58

IN THE MATTER OF THE PROTEST OF PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO ID. NO. 01-508114-001, PROTEST TO DENIAL OF CLAIMS FOR REFUND OF CORORATE INCOME TAXES FOR TAX YEARS 1992, 1993, 1994, 1995 AND 1996.

DECISION AND ORDER

This matter comes on for determination before Gerald B. Richardson, Hearing Officer, based upon a stipulation of facts, stipulated exhibits and briefs of the parties. Production Credit Association of Eastern New Mexico, hereinafter, "PCA", was represented by Curtis W. Schwartz, Esq., of Modrall, Sperling, Roehl, Harris & Sisk, P.A. The Taxation and Revenue Department, hereinafter, "Department", was represented by Frank D. Katz, Chief Counsel. Based upon the evidence and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. PCA timely filed New Mexico corporate income tax returns and timely paid New Mexico corporate income taxes for the tax years 1992, 1993, 1994, 1995 and 1996.

2. On April 23, 1996, PCA submitted a claim for refund of all New Mexico income tax paid for its 1992 tax year in the amount of $56,745.

3. On September 9, 1997, PCA submitted claims for refund of all New Mexico income taxes paid for the tax years 1993, 1994, 1995, and 1996 in the total amount of $287,037.

4. PCA based its claims for refund for tax years 1992-1996 upon its understanding that, as a matter of law, it is a federal instrumentality immune or exempt from state income taxation pursuant to the Supremacy Clause of the United States Constitution.

5. The Department did not act on PCA's claim for refund for its 1992 tax year within the 120-day time period provided for by § 7-1-26 NMSA 1978, rendering the claim for refund deemed denied.

6. On September 18, 1996, PCA timely filed a protest to the Department's deemed denial of its claim for refund for its 1992 tax year.

7. On January 26, 1998, in a letter from Mike D. Baca, Supervisor, Corporate Income Tax Unit, to PCA, the Department denied PCA's claims for refund for its 1993 through 1996 tax years.

8. On April 23, 1998, PCA timely filed a protest to the department's denial of its claims for refund for its 1993-1996 tax years.

9. In this consolidated protest proceeding, PCA seeks all amounts claimed as refunds for its 1992-1996 tax years, plus interest thereon, as provided in § 7-1-68 NMSA 1978.

10. PCA is a component of the federal Farm Credit System.

11. The Farm Credit System is a network of farmer and rancher-owned cooperative lending institutions.

12. The lending and financial activities of PCA are under the direct supervision and approval of, and subject to standards prescribed by, the Farm Credit Bank of Texas and, ultimately, the federal Farm Credit Administration.

13. Production credit associations were initially capitalized and owned entirely by the United States, though Congress hoped that production credit association earnings could be used to retire its stock.

14. Congress hoped that as the production credit associations retired government held stock, that they could become local lenders, owned by borrowers.

15. Congress' hope was realized by the 1960's, by which time the production credit associations were owned entirely by borrowers with the United States not having any ownership interest.

16. The Production Credit Association of Eastern New Mexico (PCA) has its principal place of business in Clovis, New Mexico.

17. PCA is a federally chartered corporation incorporated pursuant to the provisions of the Farm Credit Act of 1933.

18. PCA was incorporated pursuant to federal law utilizing a Farm Credit Administration pre-printed set of Articles of Incorporation dated February 15, 1934.

19. PCA was duly chartered on February 27, 1934 as an agricultural credit cooperative pursuant to the provisions of the Farm Credit Act of 1933.

20. The charter was issued by the Farm Credit Administration.

21. Pursuant to federal statute, PCA is a federal instrumentality. 12 U.S.C. §§ 2071(a), 2071 (b)(7), 2077. *See also*, 12 U.S.C. § 2279c(b).

22. The United States Farm Credit Administration chartered PCA in 1934 under its original name, the "Clovis Production Credit Association."

23. PCA subsequently changed its name to the current one, effective March 1, 1984.

24. The corporate purpose for PCA was and is to exercise powers granted to it by Congress under the Farm Credit Act of 1933 as it existed or may be amended.

25. Pursuant to a "Certificate of District To Be Served" issued by the Farm Credit Administration, the Farm Credit Administration limited PCA to lending in Quay, Curry, DeBaca, Guadalupe and Roosevelt Counties in New Mexico.

26. PCA loans money for periods of ten years or less.

27. PCA does not lend to the general public, but only to qualified ranchers or farmers.

28. PCA is not a depository bank and has no deposit insurance.

29. Pursuant to bylaws imposed by the Farm Credit Administration, PCA is authorized to issue Class A and Class B stock with a par value of five dollars.

30. Though its bylaws authorize PCA to offer other classes of common and preferred stock at $5 par value, it has never done so.

31. All PCA borrowers as a requirement of obtaining a loan are required to purchase Class B $5 par voting stock of PCA in an amount equal to 10% of the unpaid principal balance of the loan.

32. As part of the loan, sufficient proceeds are generally advanced to purchase the required Class B Stock.

33. Class B stock is not entitled to dividends.

34. Each holder of Class B voting stock has only one vote in PCA affairs, regardless of the number of shares held. In the case of a joint loan, only one of the joint borrowers may vote, as authorized by the other joint borrowers.

35. Class B stock may be retired at the lesser of par or book value as the loan is paid down, as long as the borrower maintains the prescribed stock-to-loan balance ratio.

36. Alternatively, Class B stock may be converted to non-voting Class A stock also with a par value of five dollars.

37. Class A stock may be retired for the lesser of par or book value.

38. Class A stock is not entitled to dividends.

39. PCA obtains its funds from the Farm Credit Bank of Texas; though until March 1991, it obtained funds from the Farm Credit Bank of Wichita.

DISCUSSION

This case presents the issue of whether New Mexico is permitted under the Supremacy Clause of the United States Constitution to impose income tax upon the income of the Production Credit Association of Eastern New Mexico, hereinafter, "PCA." It is undisputed that PCA, as a production credit association of the federal Farm Credit System, is a federal instrumentality. *See,* 12 U.S.C. §§ 2071(a), 2071(b)(7), 2077 and 2279d(b). PCA argues that its status as a federal instrumentality stands as an absolute bar to state taxation and that no further inquiry is either necessary or proper. The Department argues that not every federal instrumentality is immune from tax, that Congress explicitly waived the exemption from state taxation of production credit associations when the Federal Government no longer owned stock in them, and that even though the language waiving the exemption from state tax was dropped in later amendments of the Farm Credit Act, application of principles of statutory construction leads to the conclusion that Congress did not intend to confer tax immunity upon production credit associations by those amendments.

The Intergovernmental Tax Immunity Doctrine

The immunity of the Federal Government and its instrumentalities from state taxation was first announced in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819). In that case, Chief Justice Marshall ruled that the Supremacy Clause prevented Maryland from levying a stamp tax on bank notes issued by the Baltimore branch of the Bank of the United States, a corporation chartered by Congress. This decision contains the now famous dictum by the Court, "[T]hat the power to tax involves the power to destroy; . . .", *Id.* at 431. The Court, recognizing the sovereign power of the states to tax, sought to reconcile the states' taxing power with the recognition in the Constitution that the Constitution is the supreme law of the land. It concluded:

> If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising control in any shape they may please to give it? Their sovereignty is not confined to taxation; that is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

17 U.S. at 431. It thus struck down Maryland's tax because it interfered with the federal banking function established by Congress. The Court also recognized that ultimately, the power to determine the extent of immunity from state taxation and regulation rests with Congress, which is best situated to determine whether a state tax interferes with a federal function, stating:

> In the legislature of the Union, alone, are all represented. The legislature of the Union alone, therefore, can be

> trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.

17 U.S. at 431. Accordingly, since *McCulloch*, the rule with respect to taxation of federal instrumentalities has been that if Congress does not authorize state taxation or regulation, the possibility of interference with substantive federal policy is sufficient to raise a presumption of immunity. *See, Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 865 (1824) which rejected the argument that when Congress is silent, the presumption is in favor of a state's ability to impose a tax on a federal instrumentality.

As the law of intergovernmental tax immunity developed, immunity from state taxation was accorded by the Federal Courts not only to the Federal Government and its instrumentalities, but also to persons dealing with the Federal Government, because the cost of the tax would ultimately be passed on to the Federal Government. *See, Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218 (1928). Beginning with *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), which upheld the imposition of a state tax on a federal contractor building locks and dams, however, the modern trend, with respect to federal contractors, has been to uphold a state tax if it is non-discriminatory and where the legal incidence of the tax is on the private party and not on the Federal Government or agency. *See,* also, *U.S. v. New Mexico,* 455 U.S. 720 (1982).

There has also been litigation over what constitutes a federal instrumentality entitled to state tax immunity. Thus, it has been held that instrumentalities do not include independent contractors, employees or others dealing for their own purposes with the Federal Government, but only those entities, "so assimilated by the government as to become one of its constituent parts." *U.S. v. Township of Muskegon,* 355 U.S. 484, 486 (1958). In this case, because production credit

associations are statutorily designated instrumentalities of the Federal Government, their status as an instrumentality is not in dispute. Because of the rather unique history of congressional enactments addressing their taxability, however, their immunity from taxation is hotly contested by the parties.

The Farm Credit Systems and Production Credit Associations

The Farm Credit System is a nationwide network of farmer and rancher owned cooperative lending institutions designed to serve the credit needs of the agricultural sector. The system began in 1916 with the enactment of the Federal Farm Loan Act which authorized the creation of twelve regional federal land banks. Pub. L. No. 64-158, § 4 (1916). Federal land banks could only make loans secured by first mortgages on farm and ranch property. Pub. L. No. 64-158, § 12. In 1923, Congress created federal intermediate credit banks to make other types of agricultural loans which were not secured by mortgages on farm lands. In 1988, federal land banks and federal intermediate credit banks were merged into farm credit banks. Pub. L. No. 100-233, Title IV, § 410 (1988).

Production credit associations were created by Congress in the Farm Credit Act of 1933 to provide short to intermediate term loans to ranchers and farmers. Pub. L. No. 73-98, § 20 (1933). Production credit associations were created during the Great Depression in response to the failure of commercial banks to provide adequate and affordable credit to farmers and the inefficiencies, costs and inflexibility of centralized government lending programs. S. Rep. No. 124, 73rd Congress, 1st Session, at 2 (1933). As stated in the Senate Committee on Banking and Currency Report on the legislation:

> The policy of this bill is to provide the stimulus in the form of Government capital and supervision to the establishment of local institutions in which farmers are participants and owners and through which necessary

> credit may be provided on a safe business basis and at reasonable cost.

S. Rep. No. 124, 73rd Cong., 1st Sess at 2 (1933). Production credit associations were initially capitalized and owned entirely by the Federal Government, but Congress hoped that earnings of the associations could be used to retire stock held by the Government so that they would eventually be owned entirely by their own members and borrowers. *Id.* In fact, by 1968, all production credit associations were owned entirely by their borrower-members. *See*, H.R. Rep. No. 593, 92nd Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 2091, 2098. At their creation, production credit associations were organized, chartered and regulated by the Governor of the Farm Credit Administration. Pub. L. No. 73-98, § 20. They remain subject to the regulation of the Farm Credit Administration, an independent agency of the Executive Branch of the Federal Government responsible for the regulation and examination of entities within the Farm Credit System. *See*, 12 U.S.C. §§ 2252 and 2241. The Farm Credit System and the Farm Credit Administration were reorganized by Congress by the Farm Credit Amendments Act of 1985, Pub.L. 99-205. One of the purposes of these amendments was to lessen the Government's day-to-day control of the Farm Credit System.

> The Farm Credit Administration would abandon past practices that amounted to day-to-day participation in management of the System activities and would become an arm's length regulator like other similar federal agencies. . . . Stronger federal oversight and regulation of the System will result in cutting the principal organizational ties between the Farm Credit Administration, the regulator, and the Farm Credit System banks and associations.

H.R. Rep. No. 425 at 3,12, 1985 U.S.C.C.A.N. at 2589, 2598. These changes recognized that the banks and associations,

including production credit associations, were no longer owned by the Federal Government. Thus, they were to be treated as independent, but regulated entities. The governing structure of the Farm Credit Administration was also modified. The Farm Credit Administration had been directed by a part time board that chose a full-time governor to run the agency. The 1985 Act, however, shifted the management of the Farm Credit Administration to a full time, three member presidentially appointed board, which became more of an arm's length regulator of the Farm Credit System institutions, and references to the Governor of the Farm Credit Administration were removed from the laws concerning production credit associations. *See*, H.R. Rep. No. 425 at 3 and 28, 1985 U.S.C.C.A.N.at 2589 and 2616.

The Legislative History of the Taxability of Production Credit Associations

Commencing with the legislation creating production credit associations in 1933, Congress chose to expressly provide guidance with respect to the extent to which the associations, and their property and obligations would be taxable. Specifically, it chose to limit the immunity from taxation which would otherwise be accorded a federal instrumentality, providing as follows:

> The Central Bank for Cooperatives, the Production Credit Corporations, *Production Credit Associations*, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds and other such obligations issued by such banks, *associations*, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local

> taxing authority. *Such banks, associations or corporations, their property, their franchises, capital, reserves, surplus and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial or local taxing authority; except that any real property and any tangible personal property and any tangible property of such banks associations and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired,* or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired.

Pub. L. No. 73-98, § 63, 48 Stat. at 267 (emphasis added). Thus, from the outset of their creation, the exemption from state income taxation accorded to production credit associations was expressly stated and expressly limited to periods in which some portion of the stock of an association was owned by the Production Credit Corporation, a federally chartered and owned corporation created by the same Farm Credit Act of 1933 to capitalize production credit associations.

Although Congress made a number of changes in the Farm Credit System in the Farm Credit Act of 1971, and although there were no production credit associations entitled to income tax immunity, because all such associations were now owned entirely by their members, the provisions were retained which limited the income tax immunity of production credit associations to those which still had some portion of their stock owned by the Governor of the Farm

Credit Administration. As amended by the 1971 Act, these provisions read as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inherintance and gift taxes) now and hereafter imposed by the United States, any state, territorial or local taxing authority. *Such associations, their property, their franchises, capital reserves, surplus, and other funds and their income shall be exempt from all taxation now and hereafter imposed by the United States and any State, territorial or local taxing authority; except that interest on the obligations of such associations shall be subject only to federal income tax in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and personal property of such associations shall be subject to federal, State, territorial and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

Farm Credit Act of 1971, Title II, § 2.17, complied at 12 U.S.C. § 2077 (emphasis added).

In 1985, as part of the amendments enacted by the Farm Credit Amendments Act of 1985, the last two sentences of 12 U.S.C. § 2098, which are italicized in the quotation directly above, were removed from the statute. Pub. L. 99-205, Title II, § 205(e)(16), 99 Stat. 1678, 1705 (1985). Thus, the language providing for income tax exemption and the language qualifying the income tax exemption to instances where the the stock in a production credit association is held

by the Governor of the Farm Credit Administration was removed.

There is nothing in the legislative history of the 1985 amendments to indicate that Congress, by removing the language concerning the limited immunity of production credit associations from taxes on their income, property, funds and reserves, intended to confer broad and unlimited tax immunity on such associations, beyond the immunity for their notes, debentures and other obligations conferred by the first sentence of 12 U.S.C. § 2077. Rather, with reference to Section 205, which contained these amendments, the House Report states:

> [Section 205] contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration. This section would amend the appropriate provisions of the Act to delete the requirement for specific approvals by the Farm Credit Administration of certain activities of the banks and associations by deleting the general authority of the Farm Credit Administration to supervise System institutions. These changes are consistent with one of the major purposes of the legislation which is to establish the Farm Credit Administration as an arms length regulator of the system institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions.

H.R. Rep. No. 425 at 28, 1985 U.S.C.C.A.N. at 2615. Thus, the amendments are described as technical and conforming amendments, intended to be consistent with the purpose of the 1985 Amendments Act to change the management function of the Farm Credit Administration to being a regulator rather than day-to-day manager of production credit

associations. There is no mention of any tax implications whatsoever.

Are Production Credit Associations exempt from income taxation by virtue of their status as a federal instrumentality?

The issue of the state tax immunity of production credit associations first arose after the 1985 amendments to the Farm Credit Act. Four production credit associations in Arkansas brought suit in the United States District Court of the Eastern District of Arkansas seeking declaratory judgment and injunction that they were exempt from Arkansas sales and income taxation. The District Court granted summary judgment on behalf of the production credit associations based upon their status as federal instrumentalities whose immunity from state taxation was not expressly waived by Congress. Arkansas appealed, raising the same arguments the Department raises herein. The Court of Appeals affirmed by a divided panel. *Farm Credit Services of Central Arkansas, PCA v. State of Arkansas,* 76 F.3d 961 (8th Cir. 1996). The majority opinion concluded, as did the District Court below, that because the federal statutes no longer contained an express waiver of the Production Credit Associations' implied immunity as federal instrumentalities, they were immune from Arkansas taxes. *Id.,* at 964. Judge Loken wrote a dissenting opinion, stating that Congress was best qualified to balance the competing interests involved in applying the doctrine of intergovernmental immunity to federal instrumentalities and that the application of normal rules of statutory construction could lead only to the conclusion that the 1985 technical amendments were not intended to confer an implied constitutional immunity from tax. *Id.,* at 965-967.

The Supreme Court granted certiorari and reversed the Court of Appeals. *Arkansas v. Farm Credit Services of Central Arkansas,* __ U.S. ___, 117 S.Ct. 1776 (1997). It did not reach the issue of whether production credit associations

were immune from state tax under the Supremacy Clause. Rather, it held that the Federal District Court lacked subject matter jurisdiction to determine the issue of immunity from state tax because of the operation of the Tax Injunction Act, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Court recognized that the Tax Injunction Act was a congressional statement with respect to the balance of powers between the States and the Federal Government that federal courts should not interfere with the ability of the States to define and elaborate their own laws and administrative processes, especially in an area as important as taxation, which is a power held concurrently by the States and the Federal Government. *Id.*, 117 S.Ct. at 1779-1780. Although the only exception to the jurisdictional bar contained in the Tax Injunction Act is where a plain, speedy and efficient remedy is not available from the state courts, the Court has recognized that under our constitutional system, the Federal Government has sovereign interests which it must be allowed to protect. Thus, the Court has also recognized an exception to the jurisdictional bar of the Tax Injunction Act when the United States sues to protect itself or its instrumentalities from state taxation. *Department of Employment v. United States,* 385 U.S. 355, 358 (1966). In the *Department of Employment* case, however, the United States was a co-plaintiff with the federal instrumentality, the Red Cross, in challenging the imposition of a state tax. In the litigation involving the four Arkansas production credit associations, they sued on their own. Thus, the issue before the Supreme Court in the *Arkansas v. Farm Credit Services* case was whether federal instrumentalities fall under the exception to the Tax Injunction Act when they sue without the United

States as co-plaintiff. In concluding that the federal instrumentality status of production credit associations is not sufficient for them to escape the prohibition of the Tax Injunction Act, the Court distinguished production credit associations from the United States or its agencies, such as the National Labor Relations Board, stating:

> Whatever may be the rule under the Tax Injunction Act where a federal agency or body with substantial regulatory authority brings suit, PCA's [Production Credit Associations] are not entities of that description. PCA's are not granted the right to exercise government regulatory authority but rather serve specific commercial and economic purposes long associated with various corporations chartered by the United States.
>
> * * * *
>
> The PCA's' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal and undoubted designation as instrumentalities of the United States, and despite their entitlement to those tax immunities accorded by the explicit statutory mandate, PCA's do not have or exercise power analogous to that of the NLRB [National Labor Relations Board] or any of the departments or regulatory agencies of the United States. This sufficies for us to conclude that instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act.

Id., 117 S.Ct. at 1782.

After the Supreme Court reversed the lower court determinations that the Arkansas associations were immune from Arkansas income and sales taxes, suit was brought in the Chancery Court of Pulaski County, Arkansas by the same

production credit associations to determine the issue of tax immunity. On July 1, 1998, the Chancery Court granted summary judgment to the associations. The Chancery Court ruled on the same basis as the majority of the Eighth Circuit Court of Appeals panel, that in the absence of an express congressional waiver of immunity, production credit associations are immune from Arkansas' taxes based upon their federal instrumentality status. The decision is unreported but is contained in the record herein. *Farm Credit Services of Central Arkansas, PCA, et al. v. State of Arkansas,* Chancery Court of Pulaski County Arkansas, No. 94-4931.

The Department draws from the language of the Court in *Arkansas v. Farm Credit Services of Central Arkansas,* quoted on page 16, herein, which strongly distinguished the activities and powers of production credit associations from those of the Federal Government, to argue that the federal instrumentality status of production credit associations, in and of itself, should not immunize them from state income taxation. In support, the Department cites to the following language from the Supreme Court's opinion in *United States v. New Mexico*, 455 U.S. 720 (1982):

> What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, *or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.*

455 U.S. at 735, 102 S.Ct at 1383 (emphasis added). The Department thus argues that the result in the *Arkansas Farm Credit Services* case, which effectively held that all federal instrumentalities are not so closely aligned with the Federal Government to support granting them the same exemption from the jurisdictional bar of the Tax Injunction Act, and the language from *U.S. v. New Mexico* which appears to limit the

tax immunity under the Supremacy Clause to instrumentalities which are closely aligned with the Federal Government, demonstrate that the Supreme Court has drawn away from the concept of absolute tax immunity based solely upon federal instrumentality status.

PCA correctly points out that the language with respect to federal instrumentalities quoted from *United States v. New Mexico* is dicta, since it is undisputed that the entities taxed in that case were federal contractors, and not federal instrumentalities. While the trend in twentieth century federal jurisprudence with respect to intergovernmental tax immunity has clearly been to narrow the breadth of the tax immunity of entities associated with the Federal Government, and while courts often use dicta to foreshadow trends in jurisprudence, the fact remains that there are no reported decisions which have restricted the immunity of federal instrumentalities based upon an insufficient congruency in the activities and powers of the instrumentality and the Federal Government itself. The State of Arkansas raised the identical argument in its dispute with the Arkansas Production Credit Associations and the argument was rejected by both the Eighth Circuit Court of Appeals and the Chancery Court of Pulaski County, Arkansas. In the absence of any authority which distinguishes the tax immunity of federal instrumentalities based upon how closely their activities are connected to those of the Federal Government, the Department's argument must be rejected.

This leaves us with the primary issue presented by this case. PCA argues that federal instrumentality status is talismanic with respect to immunity from state taxes in the absence of congressional authorization to tax. PCA maintains that because the the 1985 amendments to the Farm Credit Act removed the congressional authorization, the imposition of state income tax is clearly prohibited by a line of federal jurisprudence unbroken since *McCulloch v. Maryland, supra.* The Department argues that it would ignore congressional

intent to apply immunity from state income taxes to production credit associations given the legislative history of the federal statutes addressing the tax immunity of those entities.

Were we to engage in an effort to discern congressional intent behind the 1985 amendments to Section 2077, I have no doubt that Congress did not intend to confer state income tax immunity upon production credit associations by the amendments. Since at least 1968, there have been no production credit associations immune from state income taxes under the language omitted by the 1985 amendments because there were no longer any production credit associations whose stock was wholly or partially owned by the Federal Government. The House Report on the amendments makes no reference to the removal of the language addressing exemption from tax, referring to the amendments as merely "technical" and "conforming" amendments consistent with the purpose of the 1985 amendments to restructure the Farm Credit Administration. Thus, the reference to the "Governor of the Farm Credit Administration" in the last sentence of Section 2077, which limited the exemption from tax to production credit associations whose stock was held by the Governor of the Farm Credit Administration was no longer needed because the amendments restructured the Farm Credit Administration and did away with the Governor's position.

Not only were there no production credit associations that qualified for the waiver of tax immunity contained in Section 2077 when the language conferring it was removed in 1985, but that waiver of immunity had been part of the federal statutes since production credit associations were created by the Farm Credit Act of 1933. In fact, the federal scheme with respect to taxation of production credit associations had never relied upon the implied tax immunity conferred upon federal instrumentalities to confer such tax immunity. Since their

creation, Congress provided an express statutory exemption from tax for production credit associations and limited the exemption to those production credit associations which were either partially or wholly owned by the Federal Government. It would defy all logic to conclude that somehow, by removing an exemption from tax and a limitation on that exemption that had been part of the federal scheme for production credit associations for more than fifty years, but was no longer applicable, that Congress intended to create an implied common law tax immunity which had never been part of the federal scheme from the outset. To further conclude that Congress did this without a single mention or acknowledgement of this result anywhere in the legislative history pushes legal reasoning beyond reason and into the realm of absurd and unintended results.

We are thus left to choose between two legal doctrines, both of which are so well established and founded upon sound legal reasoning as to be beyond challenge as to their propriety, but which lead to diametrically opposing results. PCA argues that *McCulloch v. Maryland* and 179 years of unwavering federal jurisprudence under the Supremacy Clause dictates that the imposition of New Mexico's tax be barred. The Department argues that this result in contrary to the intent of Congress behind the 1985 amendments to the Farm Credit Act and that in construing the effect of amendments to statutes, the legislative intent must govern our determination. While both sides have done an excellent job in arguing the merits of their respective positions, neither have presented a conceptual basis which can reconcile the two conflicting legal doctrines and provide a persuasive basis as to which approach should govern this determination. For that matter, the parties in the parallel litigation in the federal courts and now the courts of Arkansas have similarly failed to come up with an approach which provides a rationale to harmonize the conflicting approaches to the resolution of this issue.

To resolve this quandry, we must examine the conceptual underpinnings of the federal instrumentality tax immunity doctrine and examine the appropriateness of applying the doctrine to the facts of this case. We must bear in mind that from the outset, the doctrine of immunity for federal instrumentalities has been a doctrine of *implied* immunity. As noted by Professor Tribe in his discussion of the development of the intergovernmental immunity doctrine:

> *McCulloch* thus announced the prophylactic per se rule that has been followed ever since. If Congress does not authorize state taxation or regulation of Federal instrumentalities, *the possibility of interference with substantive federal policy is sufficient to raise a presumption of immunity.*

Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L.R. 682, 701 (1976)(emphasis added). Thus, immunity is implied because of a presumption of interference in the absence of a congressional expression which addresses the state-federal balance.

One is led to inquire, then, on what conceptual basis can we apply a doctrine of intergovernmental tax immunity whose underpinnings rest upon an implied immunity based on congressional silence to federal instrumentalities whose tax immunity was *never* dependent upon such implied immunity? As noted earlier herein at pp. 10-13, since their creation, the tax immunity of production credit associations was expressly stated and expressly limited by explicit congressional enactments. Even to this day, the exemption from taxation for the notes, debentures, bonds and other obligations of production credit associations remains express, rather than implicit. 12 U.S.C. § 2077. Congress has not been silent with respect to the taxability of production credit associations. Under these circumstances, it makes no sense to blindly apply

a doctrine of implied immunity developed and intended to apply when Congress has been silent, to create an immunity from state income taxes which the legislative history of the applicable federal statutes clearly demonstrates was never intended to apply to privately owned production credit associations. Rather, we should look to the congressional intent behind the 1985 amendments to determine whether Congress intended to confer an immunity from state income taxes upon privately owned production credit associations. If we do so, it is clear that no such intent to confer immunity existed.

Although it is noted that this approach to the tax immunity of production credit associations relies upon distinguishing the treatment of these federal instrumentalities from those where there has not been an express congressional waiver of immunity and a subsequent amendment to that waiver, this approach to the issue of intergovernmental immunity does no violence to the underlying concept of implied immunity. Since *McCulloch v. Maryland,* the Court has noted that Congress is best situated to determine the circumstances under which a state tax interferes with the execution of federal policy, *Id.,* 17 U.S. at 431, and in the absence of such a determination, immunity would be implied. In this case, where Congress stated that there would be no state income tax immunity for privately owned production credit associations, it does no violence to the balance of power between the States and the Federal Government to look to the intent of Congress when it enacted the 1985 amendments to the Farm Credit Act to determine whether Congress intended to confer a level of state tax immunity which had not heretofore existed for privately owned production credit associations.

CONCLUSIONS OF LAW

1. PCA filed timely protests to the Department's denials of its claims for refund of corporate income tax for the 1992-

1996 tax years and jurisdiction lies over both the parties and the subject matter of this protest.

2. PCA is a federal instrumentality.

3. Since the creation of production credit associations by the Farm Credit Act of 1933, Congress expressly waived the immunity of privately owned production credit associations from the imposition of state income taxes upon their income.

4. Congress did not intend, by the enactment of the Farm Credit Amendments Act of 1985, to confer an implied immunity from state income taxes for privately owned production credit associations.

5. PCA is not immune from the imposition of New Mexico Corporation Income Tax under the Supremacy Clause of the United States Constitution.

For the foregoing reasons, the protest of PCA IS HEREBY DENIED.

DONE, this 21st day of December, 1998.

/s/ Gerald B. Richardson
GERALD B. RICHARDSON
Hearing Officer
Taxation and Revenue
Department
P.O. Box 630
Santa Fe, New Mexico 87509-0630

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision and Order were served upon the parties by mailing a copy to the counsel for PCA, Curtis W. Schwartz, Esq., Modrall, Sperling, Roehl, Harris & Sisk, P.A., PO Box 9318, Santa Fe, NM 87504-9318 and hand-delivering a copy to David Iglesias, Chief Counsel, NM Taxation and Revenue Department, all on this 21st day of December, 1998.

/s/ Gerald B. Richardson
GERALD B. RICHARDSON

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

[Monday, March 13, 2000]

No. 26,211

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,

Petitioners,

vs.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondents.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, amici briefs and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeal number 20078.

ATTEST: A True Copy

KATHLEEN JO GIBSON
Clerk of the Supreme Court

By: Jane Gurulé
JANE GURULÉ
Chief Deputy

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

[Monday, May 1, 2000]

No. 26,211

PRODUCTION CREDIT ASSOCIATION OF EASTERN NEW MEXICO,

Petitioners,

vs.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondents.

ORDER

This matter coming on for consideration by the Court, upon Motion of petitioner for rehearing and the Court having considered said motion and additional authority, and being sufficiently advised, Chief Justice Pamala B. Minzner, Justice Joseph F. Baca, Justice Gene E. Franchini, Justice Patricio M. Serna, and Justice Petra Jimenez Maes concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

ATTEST: A True Copy

KATHLEEN JO GIBSON
Clerk of the Supreme Court

By: Jane Gurulé
JANE GURULÉ
Chief Deputy